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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 536

TENNESSEE GAS TRANSMISSION COMPANY, *Petitioner*

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, LONG ISLAND LIGHTING COMPANY, AND PUBLIC SERVICE ELECTRIC AND GAS COMPANY, *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER

WILLIAM C. BRADEN, JR.
Tennessee Building
Houston 1, Texas

HARRY S. LITTMAN
JACK WERNER
HAROLD L. TALISMAN
317 Wyatt Building
Washington 5, D. C.
Counsel for Petitioner.

Washington, D. C.
February 26, 1959

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (R. 653-662)[1] is reported at 257 F. 2d 717. The opinion of the Federal Power Commission (R. 484-497) is reported at 17 F.P.C. 880.

[1] The record references set forth herein are to the joint record in case number 518 and this case.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1958 (R. 663). Petitions for Rehearing were denied on August 27, 1958 (R. 667). The petition for a writ of certiorari was filed on November 24, 1958, and was granted on January 12, 1959 (R. 669). The jurisdiction of this Court is based on 28 U.S.C., § 1254(1) (1948), and Section 19(b) of the Natural Gas Act, 52 Stat. 831 (1938), 15 U.S.C. § 717r(b).

QUESTIONS PRESENTED

1. Whether the Commission must, in an independent producer certificate case, determine the justness and reasonableness of the initial price when a question is raised as to the propriety of such initial price, or whether it can defer such matter for determination in a full rate investigation under Section 5(a) of the Natural Gas Act.

2. Whether the Federal Power Commission lacks jurisdiction to issue a certificate of public convenience and necessity to an independent producer of natural gas, where such producer indicates an unwillingness to accept a certificate conditioned on a lower initial price than agreed to by contract.

3. Whether an objection or ground not urged before the Commission on rehearing nor before the Court of Appeals in the review proceeding, can form the basis for the decision of the Court of Appeals.

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821 (1938), as amended by 56 Stat. 83 (1942), 15 U.S.C., §§717-717w, are set out in the Appendix, *infra*.

STATEMENT

This case stems from the judgment of the Court of Appeals for the Third Circuit (R. 663) on review of an order (R. 484-497) of the Federal Power Commission (Commission) authorizing four independent producers of natural gas to sell gas produced from certain acreage located in the Gulf of Mexico to Tennessee Gas Transmission Company (Tennessee), at the initial price agreed upon in the contracts. The Court of Appeals vacated the Commissions order and remanded the proceedings to the Commission (R. 662).

Tennessee is a natural-gas company subject to the jurisdiction of the Commission. It operates a pipeline system extending from gas fields in Texas and Louisiana through Arkansas, Mississippi, Tennessee, Kentucky, West Virginia, Ohio, Pennsylvania, New Jersey, New York, and into Massachusetts, New Hampshire, Rhode Island and Connecticut. Along this route, it serves over 80 distributing companies, which in turn serve many millions of ultimate consumers.

To meet the constantly increasing demand for gas in this vast market, Tennessee is continuously searching for the best possible gas supplies at the lowest possible prices.[2] To this end, Tennessee, in August, 1956, entered into identical 20-year gas purchase contracts with four producers of natural gas, collectively re-

[2] In Tennessee's recent application in Docket G-11107, it sought authority to increase substantially its system capacity in order to meet the increased requirements of its customers totaling over 300,000 Mcf per day. (17 F.P.C. 461, 469). By order issued January 28, 1959, that application was granted in major part.

ferred to as CATCO[3] (R. 24a-25a, 40a-41a, 286a-328a).[4] These producers each own an undivided 25 per cent interest in leases located a substantial distance off the coast of Louisiana in the Gulf of Mexico (R. 23a-24a, 280a). From those leases, up to two trillion cubic feet of gas is dedicated to the performance of the contracts and an additional trillion cubic feet of gas can also be dedicated under the contracts (R. 236a, 294a-296a).

The CATCO producers filed applications with the Commission for certificates of public convenience and necessity authorizing the sales to Tennessee pursuant to the aforementioned contracts. The Commission consolidated the applications for hearing. By order issued February 27, 1957, Tennessee was permitted to intervene in the consolidated proceeding (R. 330a). By the same order, four customers of Tennessee were permitted to intervene, two of which are respondents herein (R. 330a). The Public Service Commission of the State of New York (New York Commission), the other respondent herein, intervened in the Commission proceeding by the filing of a Notice of Intervention (R. 329a).

The major concern of these intervenors before the Commission was the initial price of 21.4 cents[5] per Mcf

[3] Cities Service Production Company, Atlantic Refining Company, Tidewater Oil Company and Continental Oil Company. None of these companies owns any interest in Tennessee or in each other. Tennessee does not own any interest in any of these companies (R. 24a). These companies are the Petitioners in Case No. 518.

[4] Since the contracts with the four producers are identical, only one of the contracts was designated for printing in the record.

[5] Plus 1 cent for the Louisiana gathering tax. The intervenors were also concerned with escalation provisions in the contracts which required at every four-year interval after November 1, 1962, an automatic increase in price of 2 cents per Mcf (R. 310a).

which Tennessee had agreed to pay for this gas. This price was the result of arm's-length negotiations extending over a period of some ten months (R. 43a). Tennessee acknowledged that this was a higher price than it was paying under any of its other previously-executed contracts.[6]

However, the immensity of the gas reserves dedicated to Tennessee under these contracts makes them unique when compared with Tennessee's other gas purchase contracts. Indeed, as far as is known, it is the largest block of gas ever sold in one transaction on the Gulf Coast (R. 41a-42a, 251a). The CATCO gas reserves constitute from 11 to 12 per cent of the total reserves available to Tennessee (R. 139a-140a) and are located in a new gas producing area where neither Tennessee nor any other pipeline company had gas purchase contracts (R. 43a-44a).

This large reserve is well located in relation to Tennessee's system, thereby affording Tennessee an entry into the vast areas of gas reserves situated off-shore from the State of Louisiana (R. 41a, 250-251a). To attach the reserves Tennessee had to construct only 46.4 miles of pipeline (R. 45a-46a). This is to be contrasted with over 500 miles of pipeline which Tennessee had to build in order to bring certain Texas gas into its system. Further indication of the value of these

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This concern was alleviated by the producers, however, by their later agreement to modify these provisions so that the Commission would retain jurisdiction over the increases in the event the Harris Bill (H.R. 6790, 85th Congress), or substantially similar legislation was enacted into law (R. 488).

[6] Assuming the purchase of 240,000 Mcf of gas per day under the instant contracts during the entire year 1958, Tennessee's weighted average cost of gas would be increased by only 0.97 cents per Mcf (R. 45a).

reserves in relation to location is shown by the fact that El Paso Natural Gas Company, which was also negotiating for these same reserves, would have had to build 600 miles of pipeline to bring the gas involved into its system (R. 250a, 42a). Among other pipeline companies attempting to purchase these reserves were Southern Natural Gas Company, United Fuel Gas Company and American Louisiana Pipe Line Company (R. 42a).

While the Respondents herein attacked the initial price of 21.4 cents per Mcf as being too high, *no evidence in support of their contention was offered.* They nevertheless urged that the certificates be conditioned on a lower price, although, as shown below, each of them differed on what that price should be (R. 378a-379a, 389a, 390a).

On March 29, 1957, the Presiding Examiner issued his Decision (R. 335a-359a) wherein he recommended a grant of the producer certificates applied for, but declined to impose a condition requiring a reduction in the initial price of 21.4 cents. In exceptions filed to that decision, the New York Commission requested the imposition of a condition requiring an initial price of 15.4 cents per Mcf, exclusive of tax (R. 389a); Lake Shore Pipe Line Company (not a party herein) requested a 17-cent initial price; Public Service Electric and Gas Company (Public Service) requested the imposition of a price condition "which would require that the proposed sales be made at such lower price which would protect the interest of the consumers" (R. 394a); and Long Island Lighting Company (Long Island) requested that if the 21.4-cent initial rate were permitted to stand, the rate be made the subject of rate

investigations under Section 5(a) of the Natural Gas Act[7] (R. 379a-380a).

On April 22, 1957, the Commission, upon review of the Examiner's Decision, issued an order (R. 519-525; 17 F.P.C. 574) granting temporary certificates to the producer-applicants,[8] but remanded the matter to the Presiding Examiner "to determine at what rate the public convenience and necessity requires the sale of natural gas by CATCO to Tennessee Gas to be made if these CATCO companies are granted permanent certificates of public convenience and necessity" (R. 524; 17 F.P.C. 574, 576).[9]

A motion for modification of the April 22, 1957 order was filed by the producer-applicants on May 6, 1957 (R. 396a-404a), in which they pointed out that the economic risk to which they would be exposed precluded their acceptance of the temporary certificates. Accordingly, they requested the issuance of permanent certificates without condition as to initial price. They did offer, however, to amend the price escalation provisions of the contracts so as to assure Commission jurisdiction over such prices in the event the Harris Bill (H.R. 6790, 85th Congress) was enacted into law (R. 401a-403a).

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[7] This is precisely what was done by the Commission in its Order here involved (R. 487-488).

[8] By the same order, a temporary certificate was issued to Tennessee authorizing the construction of the facilities necessary to bring the gas into its system. Such facilities have been constructed.

[9] The Commission there concluded that there was insufficient evidence on which to base a finding that the public convenience and necessity required the sales at the particular price proposed (R. 521; 17 F.P.C. 574, 575).

On May 20, 1957, the Commission issued an order in which it granted permanent certificates to the producer-applicants as requested in their motion for modification. By the same order, however, it conditioned the certificates by requiring an amendment of the gas purchase contracts so as to provide for an initial price of 17 cents per Mcf (exclusive of the one-cent gathering tax) with the right of the producers to file for an increase in rates (not to exceed 21.4 cents per Mcf) to be effective one day after commencement of deliveries to Tennessee (R. 526-534; 17 F.P.C. 732). The price of 17 cents was selected by the Commission simply because it was the highest price then being paid by Tennessee for gas purchased in the southwestern part of the United States (R. 529; 17 F.P.C. 732, 734).

On June 4, 1957, Tennessee filed an Application for Rehearing of the May 20, 1957 order (R. 416a-423a). In its Application for Rehearing, Tennessee stated (R. 418a):

> "Tennessee has been definitely advised by the producer-applicants that they will not amend Section 10 of the contract so as to change the initial rate from 21.4 cents per Mcf to 17 cents per Mcf. Tennessee has been further informed by the producer-applicants that the certificates issued by said order will not be accepted by them for that reason, and that, accordingly, the contracts will be terminated. It is clear, therefore, that Tennessee now faces the stark reality of contract termination; and its customers face the grim reality of suffering the loss of natural-gas supplies which are required to insure adequate and continuous long-term service and to meet the expanding needs of the consumers. The consequences of the loss of these valuable gas reserves are so far-reaching and the impact thereof on the economy of the areas involved is so great as to stagger the imagination. * * *"

Oral argument on the application for rehearing was held before the entire Commission, and on June 24, 1957 the order here involved (R. 484-497)[10] was issued by the Commission. Upon further evaluation of the record, the Commission found that "the record does not show that the 21.4 cent price is excessive." It concluded that in the light of the circumstances involved, and in view of the fact that it could protect the public "with respect to the matter of price" through the rate investigation provisions of the Act, the "precise charge that is made initially is less important than the assurance of this great gas supply." The Commission, therefore, reversed its previous determination and issued certificates without any condition affecting the initial price. While the order permitted the initial rate to remain at 21.4 cents, it made the rate subject to investigation as to the justness and reasonableness thereof in Section 5(a) proceedings instituted against all four of the producer-applicants (R. 487-488).[11]

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[10] At the oral argument its was demonstrated that in a number of cases the Commission had authorized sales along the Louisiana Gulf Coast at an initial price of 20 cents or more (See also R. 248a-249a). For example, see *Houston, Texas Gas & Oil, et al.*, 16 F.P.C. 118, 125, where the initial price was "21.0 cents per Mcf for the first two years after initial delivery and 22.5 cents per Mcf after the first two years." Affirmed on appeal, where intervenors raised a price issue similar to that raised in the instant case, *sub nom., Florida Economic Advisory Council v. F.P.C.*, 251 F. 2d 643, 646 (D.C. Cir. 1957); *cert. denied*, 356 U.S. 959.

[11] Section 5(a) rate investigations had already been instituted against three of the producers. Accordingly, concurrently with the issuance of the June 24, 1957 order, the Commission instituted a Section 5(a) investigation against the fourth producer, Cities Service Production Company (R. 488). Those investigations are now in progress.

In the same order, the Commission required the contracts to be amended "so that the price increases will remain subject to our control by using 'indefinite pricing clauses' rather than 'definite pricing clauses' within the meaning of the Harris Bill [H.R. 6790, 85th Congress]."

The respondents filed petitions for review (R. 475-620) which were predicated, in essence, on the contention that the Commission abused its discretion in not conditioning the certificates on a lower price. The Court of Appeals, in vacating the Commission's order, stated, *inter alia:*

> "* * *. We conceive of the question, however, as a more fundamental one, involving the statutory jurisdiction of the Federal Power Commission. It is whether the Commission has authority to consider an application for a certificate under Section 7(e) where the terms of the application limit the scope of the inquiry which the Commission is required to make for a determination of public convenience and necessity." (R. 658).
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> * * * * *
>
> "It was only after the threat of withholding the gas from the interstate market that the Commission retreated from its previous position and granted the certificates without rate conditions by its order of June 24, 1957." (R. 660).
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> * * * * *
>
> "The Commission has jurisdiction to issue certificates under Section 7(e) based upon its independent judgment after an untrammelled consideration of all the elements which it deems necessary to arrive at that judgment. Congress has not given the Commission power to inquire into the issue of public convenience and necessity where, as here, the applicant circumscribes the scope of that inquiry by attaching a condition to its appli-

cation requiring the Commission to forego the consideration of an element which may be necessary in the formulation of its judgment. Otherwise stated, the Commission has not been endowed by Congress with jurisdiction to conduct a *limited* inquiry.

"Congress has also made it clear that the applicant must be *willing* to perform the services proposed and conform to the provisions of the Act. The action of the applicants in curtailing the decision-making power of the Commission demonstrates their unwillingness to conform to the provisions of the Act; this in itself would require the denial of the applications. The Commission's function is to regulate the sale of gas by producers willing to sell under regulations arrived at in accordance with the provisions of the Act. Such regulations may not be the result of bargaining with an unwilling seller." (R. 662).

SUMMARY OF ARGUMENT

The principal question presented by this case is whether an independent producer of natural gas deprives the Commission of jurisdiction to consider his application for a certificate to sell gas in interstate commerce when he advises the Commission that he will decline to accept a certificate conditioned on a lower initial price being charged than agreed upon in his contract with the pipeline company buyer. The court below, *sua sponte*, held that such advice by the producer deprived the Commission of jurisdiction to consider further the application.

Implicit in the decision of the court below is the assumption by the court that a finding of justness and reasonableness of the initial price to be charged for gas is a required finding in a certificate case under Section 7(e) of the Natural Gas Act; and that, there-

fore, the Commission cannot leave for determination in a simultaneously-instituted Section 5(a) rate investigation the question of the justness and reasonableness of the initial price.

Section I of this brief treats the question of whether a finding of justness and reasonableness of the initial price is a prerequisite to the issuance of a certificate in a Section 7(e) proceeding. Section II of this brief discusses the jurisdictional issue raised and decided by the court below. Section III of the Brief demonstrates the *sua sponte* nature of the decision of the court below.

I

Section 7(e) of the Natural Gas Act requires that a certificate shall be issued to any qualified applicant if the Commission finds that "the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act * * * and that the proposed * * * sale * * * will be required by the present or future public convenience and necessity * * *." Nowhere, in Section 7 (the Certificate Section of the Act) is there a requirement that the Commission must affirmatively find that the initial price at which a sale of gas is to be made is just and reasonable.

In the case at bar, the Commission made no determination as to the justness and reasonableness of the initial price. From the record, it could not be determined whether the price was just and reasonable or unjust and unreasonable. The record did show that the price was higher than Tennessee was paying under its other gas purchase contracts, but such fact, in itself, does

not prove that the price is unjust and unreasonable. This is particularly so inasmuch as the gas involved is produced from wells located several miles off-shore from the State of Louisiana in the waters of the Gulf of Mexico, where drilling costs obviously are much higher than on-shore.

Faced with the fact that the large block of gas involved was urgently needed to serve interstate markets, that the leases were in jeopardy unless production were commenced in 1958, and that the producers would not accept a lower *initial* price than the 21.4-cent price agreed upon in the contracts, the Commission, in its informed judgment, certificated the sales without imposing a condition, as requested by Respondents, requiring the sale to be made at a lower initial price. At the same time, however, the 21.4-cent price was made the subject of full-fledged rate investigations under Section 5(a) of the Natural Gas Act.

The Commission could have insisted in the exercise of its discretion, that proof of the justness and reasonableness of the initial price be made in the certificate case. But the submission of such proof and the decision thereon would have resulted in considerable delay, if not complete frustration, in Petitioner's efforts to bring needed gas supplies to the consuming public. This is particularly so in view of the fact that in the relatively short period of time which has elapsed since this Court's decision in *Phillips Petroleum Company v. State of Wisconsin*, 347 U.S. 672, 74 S. Ct. 794 (1954), the Commission has been unable to establish firm standards or criteria by which to measure the justness and reasonableness of producer prices for gas. This is unlike the situation in the natural gas pipeline field where standards and criteria have been developed by which

the justness and reasonableness of pipeline rates can be measured. *City of Detroit, Michigan* v. *F.P.C.*, 230 F. 2d 810 (D.C. Cir., 1955), *cert. denied* 352 U.S. 829 (1956).

It goes without saying that if a finding of justness and reasonableness as to initial rates is *mandatory* under Section 7(e) of the Natural Gas Act, then administrative necessity or convenience may be insufficient to avoid such requirement. If such a finding is not mandatory—as we contend it is not—then the failure to make such a finding cannot be error unless an abuse of discretion is involved. Here, the Commission exercised its discretion after giving careful consideration to the consequences which might flow from imposing a price condition in the certificates. Only if the Commission acted arbitrarily are the courts justified in overturning the decision. *Ayrshire Collieries Corp.* v. *U. S.*, 335 U.S. 573, 69 S. Ct. 278 (1949); *Radio Corp. of America* v. *U. S.*, 341 U.S. 412, 71 S. Ct. 806 (1951); *Panhandle Eastern Pipeline Company* v. *F.P.C.*, 232 F. 2d 467, 473 (3rd Cir. 1956); *Charleston and Western Carolina Ry. Co.* v. *F.P.C.*, 234 F. 2d 62, 64 (D.C. Cir. 1956).

It cannot be gainsaid that the rate standard of the Natural Gas Act, as reflected in Sections 4(a) and 5(a) thereof, is justness and reasonableness. But that is not to say that *findings* as to justness and reasonableness must be made before a rate is permitted to become effective. Were such findings mandatory, the Commission would be required to suspend each and every change in rate filed by a natural-gas company, and determine the justness and reasonableness thereof before permitting that changed rate to be collected

without an undertaking to refund such portion thereof as may later be found unjustified (Section 4(e)). Section 4(e) of the Act, however, clearly makes the suspension of rates *discretionary* with the Commission. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 338, 76 S. Ct. 373, 377-8 (1956).

Indeed, if a finding of justness and reasonableness is a mandatory requirement under Section 7(e) of the Act, then the imposition by way of a certificate condition of a lower initial price than agreed to by contract would appear to be unlawful, unless the Commission were able to find that such lower initial price itself was just and reasonable. At no time during the course of this proceeding before the Commission or the court below, did the Respondents submit any proof or make any contention that a finding of justness and reasonableness could be made with respect to any of the lower prices which they urged the Commission to adopt by way of a certificate condition.

Were the Commission to require proof of the justness and reasonableness of initial prices (notwithstanding the lack of established standards) in producer certificate cases, the entire administration of the certificate provisions of the Natural Gas Act would completely bog down. Pipeline companies are continuously applying for certificates to enable them to expand to meet the ever-growing needs of the markets for natural gas. To meet such needs, gas must be obtained from independent producers. Obviously, the expansion of the natural-gas industry would come to a virtual standstill if the gas supplies are tied up in protracted certificate cases turned into *de facto* rate cases. The Commission has recognized this fact and

has, with only a single exception (*Signal Oil and Gas Company* v. *F.P.C.*, 238 F. 2d 771 (3rd Cir., 1956)), declined to resolve the price question in producer certificate cases.

II

There is no basis in the Natural Gas Act for concluding that the act of filing an application for a certificate automatically subjects the gas involved to the jurisdiction of the Commission. A producer of natural gas is free to sell his gas in an interstate market, an intrastate market, or use it himself for various purposes. Until a producer places his gas in interstate commerce, he is not subject to the jurisdiction of the Commission. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Company*, 337 U.S. 498, 69 S. Ct. 1251 (1949). *Cf. The Central West Utility Company* v. *F.P.C.*, 247 F. 2d 306 (3d Cir., 1957).

The rules and Regulations of the Commission recognize that an applicant need not accept the certificate tendered to him. Thus, Section 157.20 of the Commission's Rules and Regulations (18 C.F.R. 157.20) specifically provides that a certificate, to be effective, must be accepted by the applicant in writing within 30 days from the date of issuance.

The legislative history of Section 7(e) (*infra*, pp. 34, 35), also demonstrates conclusively that an applicant does not subject his gas to the jurisdiction of the Commission by the mere act of filing an application for a certificate.

Every applicant for a certificate is, therefore, in practical and legal effect, requesting a certificate

exactly as applied for in his application. Implicit in every application is the understanding (based on the Commission's own Rules and on Section 7(e) of the Act) that unless the certificate issued to the applicant is acceptable to him, he will refuse to accept it and subject his property to the jurisdiction of the Commission. Patently, it cannot be assumed—as the court below apparently did—that implicit in the act of filing an application is the willingness of the applicant to accept any certificate, regardless of the conditions imposed therein, issued by the Commission. This being the case, the court below was clearly in error in holding that the stated unwillingness of the producer applicants to accept the certificates conditioned on a lower initial price than that contained in the contracts automatically made them ineligible to receive certificates, and thereby deprived the Commission of statutory authority to issue such certificates.

The court below was of the view that the stated unwillingness of the producers to accept a lower initial price for their gas circumscribed the scope of the Commission's inquiry thereby "requiring the Commission to forego the consideration of an element which may be necessary in the formulation of its judgment." But the order of the Commission here involved demonstrates very clearly that the Commission did consider very carefully the question of initial price. Indeed, the major part of the order deals with the question of price. To be sure, the Commission did not attempt to make findings as to the justness and reasonableness of the initial price. (Such findings, as we demonstrate in Section I of this Brief, are not necessary in producer certificate cases.) But that is not to say that the Commission gave no con-

sideration to the matter of price. It did not blindly certificate the sales involved in complete disregard of the price question. Since there was no showing in the record that the price was excessive, and since the gas was urgently needed for the interstate market, the Commission, in its discretion, certificated the sales at the initial price proposed, but made that price subject to a full rate investigation under Section 5(a) of the Act.

It would be one thing if the record showed that the initial price was excessive, and notwithstanding such a record, the Commission certificated the sales without more. It is quite another thing, however, where, as here, there was no showing that the initial price was excessive and where, as here, the Commission did make the price subject to a Section 5(a) rate investigation. If, as a result of such investigation, the price is determined to be too high, the Commission has authority to prescribe a lower price. It is a fact that if the price actually turns out to be too high, there is no way by which the excess in price paid in the interim can be recouped. That fact, however, is one of the facts necessarily considered by the Commission together with all the other facts bearing on the public convenience and necessity. Patently the Commission considered the possibility of Tennessee having to pay temporarily a price which *might* be excessive, to be outweighed by the immediate need of the consumers for the gas. Such determination, we submit, was peculiarly within the administrative competence of the Commission, and was a proper exercise of its statutory duties. Even though a reviewing court would not have made the same determination, it is not justified in substituting its judgment for that of the Commission. *Pan-*

handle Eastern Pipe Line Company v. *F.P.C., supra; Charleston & Western Carolina Ry. Co.* v. *F.P.C., supra; Radio Corp of America* v. *U. S., supra.*

III

Section 19(a) of the Natural Gas Act provides that as a condition precedent to invoking the review authority of the courts, a petitioner must first file with the Commission an application for rehearing setting forth the specific ground or grounds upon which such application is based. Section 19(b) of the Act provides further that:

> "* * * No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. * * *"

The decision of the court below rests on its determination, *sua sponte,* that the Commission lacked authority to issue a certificate once the applicants advised the Commission that they were unwilling to accept a certificate conditioned on a lower initial price. Even assuming, *arguendo,* that this determination is correct, the court below was precluded from deciding this case on such ground because it was not first raised before the Commission by Petitioners below (Respondents here). *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 324 U.S. 635, 649-651; 65 S. Ct. 821, 828-829 (1945). *Cf. Halsted* v. *S.E.C.*, 182 F. 2d 660, 669-70 (D.C. Cir. 1950); Courts are also precluded from raising the matter *sua sponte. Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498-501, 75 S. Ct. 467, 471-3 (1955).

ARGUMENT

I.

A FINDING OF JUSTNESS AND REASONABLENESS OF THE INITIAL PRICE FOR GAS IS NOT REQUIRED IN ORDER TO GRANT A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

The court below was of the view that:

> "* * * Congress has not given the Commission power to inquire into the issue of public convenience and necessity where, as here, the applicant circumscribes the scope of that inquiry by attaching a condition to its application requiring the Commission to forego the consideration of an element which may be necessary in the formulation of its judgment. Otherwise stated, the Commission has not been endowed by Congress with jurisdiction to conduct a *limited* inquiry" (R. 662).

The element which the court below felt "may be necessary in the formulation of its [the Commission's] judgment" was the element of the initial price[12] for the gas. Thus, implicit in the opinion of the court below is the holding that the Commission must in every producer certificate case find that the initial price agreed upon by contract is just and reasonable before it can issue a certificate. For without such a finding, it would have omitted an element which the court below considered "a necessary consideration in the scope of inquiry into the determination of public convenience and necessity" (R. 662).[13]

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[12] The words "price" and "rate" are used interchangeably in this Brief.

[13] While the court below stated (R. 659) that it did not reach the question of whether the Commission must fix the initial rate "when its inquiry demonstrates that there is a substantial question of the reasonableness of that initial rate," the opinion, as

The Commission in the instant case made no finding that the initial price was just and reasonable. Nor did the Commission make a finding that the initial price was unjust and unreasonable. In essence, what the Commission found was that the record did not show whether the initial price of 21.4 cents was or was not just and reasonable (R. 487). It granted the certificates applied for, but simultaneously instituted an investigation under Section 5(a) of the Natural Gas Act into the justness and reasonableness of the 21.4-cent price (R. 487-488). If the Commission is *required* in every producer certificate case to make a finding as to the justness and reasonableness of the initial price, it is apparent that the Commission did not meet that requirement in the order here involved. On the other hand, if such a finding is not required in a producer certificate case, then, we submit, the only pertinent question is whether the Commission abused its discretion when it declined to condition the certificates on a lower initial price, but left for determination in a full rate investigation under Section 5(a) of the Act, the question of the justness and reasonableness of the initial price.

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we construe it, leads to the inevitable conclusion that the justness and reasonableness of the initial rate is one of the elements which the Commission must consider in determining whether or not a certificate should be issued. We respectfully submit that if the level of the initial rate must be considered, it cannot be so considered unrelated to the question of justness and reasonableness. Were it otherwise, the court below would have had to affirm the order involved inasmuch as it is apparent from that order that the Commission *did* consider the level of the initial rate and made the determination that the sale should be authorized *at that rate* (R. 487).

A. The Natural Gas Act Does Not Require a Finding of Justness and Reasonableness of Initial Rates in Certificate Cases

1. Section 7(e) of the Natural Gas Act provides in pertinent part that:

> "* * * a certificate shall be issued to any qualified applicant therefor, * * * if it is found that the applicant is able and willing properly to do the acts and perform the service proposed and to conform to the provisions of the Act * * *, and that the proposed service, sale, * * *, is or will be required by the present or future public convenience and necessity; * * *."

Had Congress intended that the Commission find that the proposed initial price was just and reasonable before issuing a certificate, it could easily have included such a requirement in Section 7(e).[14] While there is no mandatory requirement in Section 7(e) that the Commission make a finding that the initial price is just and reasonable before issuing a certificate, no contention is made here that the Commission lacks authority to inquire into the level of the initial price. Concededly, the Commission has such authority and has, in fact, made such inquiry in numerous pipeline certificate cases. But, the fact that the Commission has authority to inquire into the level of the initial price in a certificate case does not mean that the Commission *must*, if the justness and reasonableness of the price is challenged, inquire into the price and make

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[14] As originally enacted, Section 7(c) of the Natural Gas Act required the Commission to consider the level of the initial rate, "it being the intention of Congress that natural gas shall be sold in interstate commerce * * * at the lowest possible rate consistent with the maintenance of adequate service in the public interest" (52 Stat. 825 (1938)). This language was omitted in the 1942 amendment (56 Stat. 83, 84 (1942)).

findings as to the justness and reasonableness thereof. *Florida Economic Advisory Council* v. *Federal Power Commission*, 251 F. 2d 643, 646 (D.C. Cir., 1957), *cert. denied*, 356 U.S. 959 (1958); *Oklahoma Natural Gas Company* v. *Federal Power Commission*, 257 F. 2d 634, (D.C. Cir., 1958), *cert. granted*, 79 S. Ct. 117 (1958); *cert. dismissed*, February 20, 1959.

It cannot be gainsaid that the rate standard of the Natural Gas Act, as reflected in Sections 4(a) and 5(a) thereof, is justness and reasonableness. But that is not to say that *findings* as to justness and reasonableness must be made before a rate is permitted to become effective. Were such findings mandatory, the Commission would be required to suspend each and every change in rate filed by a natural-gas company, and determine the justness and reasonableness thereof before permitting that changed rate to be collected without an undertaking to refund such portion thereof as may later be found unjustified (Section 4(e)). Section 4(e) of the Act, however, clearly makes the suspension of rates *discretionary* with the Commission. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 338, 76 S. Ct. 373, 377-8 (1956).

Indeed, if a finding of justness and reasonableness is a mandatory requirement under Section 7(e) of the Act, then the imposition by way of a certificate condition of a lower initial price would appear to be unlawful, unless the Commission were able to find from the evidence that such lower initial price itself was just and reasonable. At no time during the course of this proceeding before the Commission or the court below, did the Respondents submit any proof or make any contention that a finding of justness and reasonableness could be made with respect to any of the lower

prices which they urged the Commission to adopt by way of a certificate condition.

2. Were the Commission required to make findings as to the justness and reasonableness of the initial prices in producer certificate cases, it would inevitably result in the bogging down of the Commission's producer licensing functions into a morass of certificate cases turned into *de facto* rate proceedings. The Commission has recognized this fact and, with one exception,[15] has consistently refused to resolve rate issues in producer certificate cases. *In the Matter of Anthony J. Tamborello, et al,* (Opinion 287), 11 P.U.R. 3d 413 (1955); On rehearing, 15 F.P.C. 1 (1956), 12 P.U.R. 3d 219; *In the Matter of Atlantic Refining Company,* 15 F.P.C. 665 (1956); *In the Matter of Seaboard Oil Co., et al,* 19 F.P.C. 416, 421 (1958), 23 P.U.R. 3d 1.

In the *Tamborello* case, *supra,* several intervenors urged the Commission to deny the certificates applied for unless the applicants proved that the initial prices to be paid under the contracts were reasonable. In

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[15] Re *Cities Service Gas Company and Signal Oil and Gas Company,* 12 P.U.R. 3d 3 (1955), *aff'd Signal Oil and Gas Company* v. *Federal Power Commission,* 238 F. 2d 771 (3d Cir., 1956), *cert.* denied 353 U.S. 923 (1957). The Commission in the *Signal* case conditioned the certificate on the filing of a rate of 10¢ in lieu of the 12¢ rate agreed upon by contract. The rate condition was imposed in that case because the 12¢ price proposed would have caused a general area price increase for all major sales to 12¢ per Mcf. Since gas in the area was being sold to intrastate pipelines, and since the price of intrastate gas could not be controlled by the Commission, it included the aforementioned condition to forestall price increases to intrastate pipeline companies (12 P.U.R. 3d, at p. 13). The CATCO gas, however, is located in a new producing area and, accordingly, the initial price could not cause a general area price increase (R. 43a-44a).

rejecting this request, the Commission stated (11 P.U.R. 3d, 413, 417):

> "However, because the economic and other conditions presented in certificate applications filed by independent producers are substantially different from those presented in certificate applications filed by interstate pipeline companies, the Commission has not deemed it prudent to expend the time required to resolve rate issues at this stage, nor has it found it practical to inquire into the reasonableness of producer rates in all producer certificate proceedings. In the order below which we are adopting, paragraph (1) is a standard reservation of the Commission's unquestioned right under the Act, upon its own motion or upon proper complaint, to inquire later into the reasonableness of the rates proposed to be charged by the producers. Thus, the interests of the distribution companies and the consumers are protected against unlawful rates. At the same time, this procedure permits the more efficient and rapid handling of producers' certificate applications without the complicating consideration of the producer rates."[16]

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[16] On rehearing, the Commission reaffirmed the position taken by it in Opinion 287 and stated (Opinion 287-A, 15 F.P.C. 1, 3; 12 P.U.R. 3d 221-2):

> "Adoption of the contentions of applicants for rehearing would require that prior to issuance of any certificate of public convenience and necessity authorizing the sale of natural gas in interstate commerce for resale we enter upon the equivalent of a complete section 5 investigation and, on the basis of the evidence adduced, determine the 'lowest reasonable rate.' The rate so determined would then be imposed by a condition attached to the certificate. Such holding would not only be contrary to the plain language of the act but would also prevent us from exercising the judgment and discretion delegated to us by Congress. Reasonable regulation of natural gas companies, whether interstate pipeline transmission companies or independent producers, requires that our

In the recent *Seaboard* case, *supra*, the Commission discussed at length its reasons for refusing, except in extraordinary circumstances, to impose rate conditions in producer certificate cases. It pointed out that:

> "From the beginning of the Commission's regulation over independent producers after the Supreme Court's decision in the Phillips Petroleum Company case in 1954,[4] we have been seriously concerned with assuring that, in the interest of the ultimate consumer of natural gas, certificates of public convenience and necessity authorizing sales by independent producers be issued at prices which were fair and not excessive. In pursuit of this objective, we have proceeded along two avenues. First, we have in many instances issued certificates while simultaneously entering on an investigation of the price of the proposed sale under Section 5(a) of the Act. Second, we have in other instances set certificate proceedings for formal hearing in order to determine if there was any substantial evidence to justify imposition of a rate condition, although in only one instance, the Signal Oil case, have we found sufficient evidence to justify the imposition of such a condition.[5]" 19 F.P.C. at p. 420-1, 23 P.U.R. 3d at p. 8.

"[4] *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672.

"[5] But see the CATCO case, Docket No. G-11024, 17 F.P.C. 732, where we imposed such a condition in our order of May 20, 1957, but upon more mature and careful consideration found by our order of June 24, 1957, 17 F.P.C. 880, that considering all matters which enter into a determination of the public convenience and necessity that the condition should be removed, the sales of gas certificated, and Section 5(a) proceedings instituted to determine the justness and reasonableness of the rates."

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decisions and determinations be the result of a conscientious appraisal of evidence adduced, having regard for the interest of all who may be affected thereby and our determination of the requirements of public convenience and necessity in the circumstances."

From the foregoing it is clear that the failure of the Commission to make findings as to the justness and reasonableness of the initial rate in the order here involved is consistent with the established policy of the Commission in producer certificate cases. In the words of the Commission:

> "Time and experience have attested to the soundness of our position in the Tamborello case and have forcibly demonstrated at least in the great majority of independent producer certificate cases coming before us, where the price for the proposed sale has been arrived at on an arm's-length basis, that the imposition of a rate condition under Section 7(e) reducing the price proposed by the applicant for its sale of gas is neither a proper nor practicable means for protecting the consumer against prices which may not have been shown to be just and reasonable; and that the primary instrument for the protection of the consumer against excessive rates is and must continue to be the means afforded by the rate provisions of the Act." 19 F.P.C., at p. 421, 23 P.U.R. 3d, at p. 8.

B. The Commission Did Not Abuse Its Discretion in Issuing the Certificates

1. In the instant case, as is the case in many other producer certificate cases, the Commission was confronted with a very practical problem, namely, the urgent need by consumers for additional gas—particularly an amount as large as that involved in the CATCO reserves (R. 487). It was, of course, aware of the fact that the 21.4-cent price was higher than the price being paid by Tennessee under its other gas purchase contracts. But that fact alone does not mean that the price is excessive (R. 487-488). Faced with the fact that the gas would be lost to the interstate market, the Commission, in its informed judgment,

decided to permit the CATCO companies to charge the 21.4-cent price until such time as it could determine, in a full fledged rate investigation, whether or not that price was too high (R. 487-488). As noted above, the 21.4-cent price was made the subject of simultaneously-instituted Section 5(a) rate investigations, and those investigations are now in progress.

It may be contended that because of the crowded condition of the Commission's calendar and because of the complexities involved in rate-making, it takes a substantial length of time before a Section 5(a) proceeding is concluded and a decision reached by the Commission. The short answer to such a contention is that it would take just as much time and the issues would be just as complex if the determination of the justness and reasonableness of initial rates were to be attempted in producer certificate proceedings. To be sure, in pipeline certificate cases, inquiry into the justness and reasonableness of the initial rates is made by the Commission. But new pipeline certificate cases are extremely few in number. Producer certificate cases, however, can be numbered in the thousands since this Court's decision in the *Phillips* case, *supra*. (See F.P.C. Release No. 10183, issued December 8, 1958) Additionally, the Commission has, through the years, developed standards and criteria by which to measure the justness and reasonableness of pipeline rates. No such standards or criteria have as yet been developed in the independent producer field, although the Commission is struggling with that industry-wide problem now.

It may also be contended that Section 5(a) proceedings do not afford adequate protection to the consumer interest because Section 5(a) orders have only prospec-

tive effect, and, therefore, the amount of any excess in price paid in the interim would not be subject to refund. But this situation would only eventuate in the event the initial price is, in fact, unjust and unreasonable. There is no evidence in this record that such is the case (R. 487). Even assuming, however, that the 21.4-cent price is ultimately found to be unjust and unreasonable, that is a possibility which the Commission necessarily considered in connection with the order here involved. Obviously, it determined that such possibility was outweighed by the desirability and necessity of obtaining the CATCO gas for the interstate market (R. 487-488). Its determination, we submit, was based on a conscientious appraisal of the interests of *all* who would be affected thereby. Thus, the Commission said (R. 487):

> "* * * We are of the opinion that, in the circumstances of this case, in view of the great demand for gas by customers of Tennessee Gas, the price consideration should not be made the prime determinant of what the public convenience and necessity require. By virtue of the authority conferred upon us by Sections 4 and 5 of the Natural Gas Act and the proposal to modify the contracts made by the CATCO companies, we are of the opinion that we will be able to adequately protect the public interest with respect to the matter of price. * * *"

Only if the Commission acted arbitrarily, would Courts be justified in overturning the decision. *Ayrshire Collieries Corp.* v. *U.S.*, 335 U.S. 573, 69 S. Ct. 278 (1949); *Radio Corp. of America* v. *U.S.*, 341 U.S. 412, 71 S. Ct. 806 (1951); *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 232 F. 2d 467, 473 (3d Cir., 1956); *Charleston and Western Carolina Ry. Co.* v. *F.P.C.*, 234 F. 2d 62, 64 (D.C. Cir., 1956).

2. In many pipeline and producer certificate cases, time is either of the essence or is extremely important to the applicant as well as the distributor who is to receive the gas from the pipeline company. For example, gas leases contain provisions for the payment of "shut in" royalties unless the gas is produced and marketed as rapidly as is reasonably possible in accordance with state conservation laws. The need for capital to further develop a lease presents in many cases, an impelling need to obtain an immediate sale of gas from wells already completed. Many leases contain provisions permitting the lessor to cancel the lease unless the gas is marketed within a specified time. See *In the Matter of Seaboard Oil Co., et al, supra,* 19 F.P.C. 416, 421, 23 P.U.R. 3d 1, 9. Indeed, in the instant case, the leases held by the CATCO producers would have been in jeopardy unless production commenced in 1958 (R. 26a-27a, 78a).

3. The importance of expedition in producer certificate cases was succinctly stated by the Commission in the *Seaboard* case, 19 F.P.C., at p. 422, 23 P.U.R.-3d, at p. 9:

> "Had the issue of initial price not been considered in this proceeding, the certificate would have been issued more than a year ago. This unavoidable administrative delay, due to the raising of the initial price issue, has resulted in these properties making no return on their investment for a year, which expense must, of course, be ultimately borne by the consumer. In addition, * * * it is apparent that if there are to be delays like this in future producer cases, pipeline companies otherwise in a position to take immediate delivery of gas may lose a bargaining advantage they now possess as producers will hesitate to make concessions in price in the expectation of early deliveries, and the con-

sumer will ultimately pay the addition to the price."

Tennessee has a vital interest in the expedition of producer certificate cases. Tennessee, as well as most other pipeline companies, is constantly seeking to acquire additional gas supplies from independent producers. Such gas supplies are needed by the pipeline companies to augment their present supplies and to enable the pipeline companies to continue to expand in order to meet the constantly increasing needs of the markets. Orders for pipe must be placed with the mills several months in advance of the estimated date of delivery. Distributing companies must make advance plans to receive the additional gas. Considerable loss of time as well as money would necessarily be incurred by the delays which inevitably would result from turning producer certificate cases into *de facto* rate proceedings.

Tennessee has no desire to pay more than a just and reasonable price for the gas purchased by it. At the same time, it must be recognized, as pointed out above, that no criteria for determining justness and reasonableness of producer rates have been established. The natural gas industry cannot come to a standstill, however, while criteria are being developed. New pipelines must be built, older pipelines must expand. Natural gas is needed for both purposes. Yet, the building of new pipelines and the expansion of existing pipelines will most assuredly be delayed or come to a halt, if in each producer certificate case the Commission must determine the justness and reasonableness of the producer rates. It would be one thing if a rate, once permitted to go into effect, could not thereafter be reduced if such rate is found to be unjust and unrea-

sonable. It is quite another thing where, as is the case under the Natural Gas Act, the rate is always subject to reduction under Section 5(a) if it is, or becomes, unjust and unreasonable.

To summarize at this point, if it is not mandatory—as we contend it is not—for the Commission to make findings in producer certificate cases as to the justness and reasonableness of the initial price, then the order issued by the Commission was lawful, unless the Commission abused its discretion in granting the certificate. Under the circumstances involved, discussed in the Commission's order (R. 486-488), we submit that there was no abuse of discretion.

The law is well settled that where an administrative agency has a choice of remedies and selects one, that choice is not to be set aside merely because it is urged that another remedy might have been more appropriate. *General Protective Comm.* v. *S.E.C.*, 346 U.S. 521, 74 S. Ct. 261 (1954); *Franks Bros. Co.* v. *N.L.R.B.*, 321 U.S. 702, 64 S. Ct. 817 (1944); *Cf. Jacob Siegal Co.* v. *F.T.C.*, 327 U.S. 608, 66 S. Ct. 758 (1946); *In re Standard Gas and Electric Co.*, 151 F. 2d 326 (3rd Cir., 1945); *Ayrshire Collieries Corp.* v. *U. S.*, 335 U.S. 573, 69 S. Ct. 278 (1949); *Radio Corp. of America* v. *U.S.*, 341 U.S. 412, 71 S. Ct. 806 (1951).

It is equally well settled that when Congress has entrusted an administrative agency with the responsibility of selecting or determining the means of achieving a statutory policy, the relation of remedy to policy is peculiarly a matter for administrative competence. *General Protective Comm.* v. *S.E.C.*, *supra*; *American Power and Light Co.* v. *S.E.C.*, 329 U.S. 90, 112, 67 S. Ct. 133, 146 (1946); *Halsted* v. *S.E.C.*, 182 F. 2d 660, 667 (D.C. Cir., 1950).

II.

THE UNWILLINGNESS OF AN INDEPENDENT PRODUCER TO ACCEPT A CERTIFICATE CONDITIONED ON A LOWER INITIAL PRICE FOR GAS THAN AGREED UPON BY CONTRACT DOES NOT DEPRIVE THE COMMISSION OF JURISDICTION TO CONSIDER FURTHER THE APPLICATION OF THE INDEPENDENT PRODUCER

As demonstrated under Section I above, a finding of justness and reasonableness of the initial rate is not required in order to grant a certificate under Section 7(e) of the Act. The court below, however, was of the view that if an applicant indicates in advance that he will not accept a certificate at a lower initial price than agreed upon by contract, he thereby ousts the Commission from jurisdiction to consider further the application involved (R. 662). We respectfully submit that this holding of the court below is in error, as is demonstrated below.

A. An Applicant Is Not Required to Accept the Certificate Proffered Him

1. There is no power in the Commission to compel a producer of gas to sell his gas in the interstate market. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Company*, 337 U.S. 498, 69 S. Ct. 1251 (1949); *Cf. The Central West Utility Company* v. *F.P.C.*, 247 F. 2d 306 (3d Cir., 1957). Every applicant for a certificate is, in essence, requesting a certificate exactly as set forth in his application. Implicit in every application is the understanding that unless the certificate issued is acceptable to the applicant, he will refuse to accept it and submit to the Commission's jurisdiction. It cannot be assumed that implicit in the act of filing an application is the willingness of the applicant to accept any certificate, regardless of the conditions contained therein, which may be issued by the Com-

mission. *Cf. Sunray Mid-Continent Oil Company* v. *F.P.C.*, 353 U.S. 944, 77 S. Ct. 792 (1957). This being so, we fail to see how the Commission's authority is circumscribed when an applicant advises the Commission at any stage of the proceeding as regards a condition which he considers non-acceptable. Indeed, the right of an applicant to refuse a certificate issued to him is recognized by the Commission's Rules and Regulations (18 C.F.R. 157.20(a)) which condition the validity of a certificate on acceptance by the applicant within 30 days from the date of issuance.

A conclusive refutation of the holding of the court below can be found in the legislative history of Section 7 of the Natural Gas Act. In the hearings on the 1942 amendment to Section 7 of the Act, the following colloquy took place between Representative South and Commissioner Manly:

* * * * *

"MR. SOUTH. I presume those certificates, as a general practice, are issued upon an application?

"Commissioner MANLY. Yes; invariably upon application.

"MR. SOUTH. As a practical matter, the authority given to the Commission here could be used—and I am wondering if it is generally used—for the purpose of broadening or extending the application in such a way as to better serve the public interest.

"Commissioner MANLY. That has been the case, I am sure, in the administration of all of the cases that have come before this Commission. It has been primarily this, sir; That a company, in making an application for a certificate, would set up a claim that it would do such-and-such things; that it would put a line in at such-and-such time;

that it would have such-and-such gas reserves; that it would charge such-and-such rates:

"MR. SOUTH. Or serve a particular section of the community sought to be served?

"Commissioner MANLY. Yes, sir; that it would serve a particular community, and so forth.

"Now, what the Commission does under ordinary conditions is to require those conditions to be set forth in the authorization for a certificate that is accepted by the company as a condition precedent to the actual issuance of the certificate, so that in all intents and purposes *the company has a right to reject a certificate containing any conditions which are unreasonable, onerous, or have no relevancy to the issue.*

"MR. SOUTH. That is what I have in mind. If they are too burdensome, then the application could be withdrawn.

"Commissioner MANLY. *They could come back before the Commission and ask for a rehearing if they regard the terms and conditions as being onerous.*" (Emphasis supplied. Hearings before House Committee on Interstate and Foreign Commerce on H.R. 5429, 77th Cong., 1st Sess. (1941) p. 23.)

The foregoing, we submit, conclusively demonstrates that the court below was in error in holding that the applicants circumscribed the scope of the Commission's inquiry by their refusal to accept a certificate conditioned on a lower initial rate. By the same token, the court below was equally in error in holding that the refusal ousted the Commission from jurisdiction to consider further the producer applications.

2. The court below was equally in error in holding that the "action of the applicants in curtailing the

decision-making power of the Commission demonstrates their unwillingness to conform to the provisions of the Act; this in itself would require a denial of the applications." First, as demonstrated below, the decision-making power of the Commission was not, in fact, curtailed by the applicants. The Commission was free, regardless of the stated position of the applicants, to consider the level of the initial price. Thus, assuming *arguendo* that a finding of justness and reasonableness of initial price is mandatory in a producer certificate case, the Commission was obviously free to determine whether or not the particular initial price was just and reasonable. Second, unwillingness to accept a certificate different from that applied for can hardly, in view of the Commission's own Rules and the legislative history set forth above, be construed as an "unwillingness to conform to the provisions of the Act."

B. The Commission Did, in Fact, Consider the Matter of Price

As previously noted, the court below held that the applicants limited "the scope of the inquiry which the Commission is required to make" thereby "curtailing the decision-making power of the Commission" (R. 658, 662). Since by that language the court below evidently meant that the Commission was thereby precluded from making findings as to the justness and reasonableness of the initial price, the obvious answer is that such findings are not essential in a certificate case, as demonstrated above. Moreover, the absence of such findings did not stem from the applicants' unwillingness to accept a lower initial price, but stemmed rather from carefully considered Commission policy, as attested by the *Tamborello* and *Seaboard* cases, *supra*.

If, on the other hand, the court below meant that he Commission gave no consideration to the questio f price, the court was in error. The Commission's rder, read together with the dissenting opinion of ommissioner Connole, demonstrates very clearly that areful consideration was given to the matter of price R. 484-497). Indeed, the principal matter discussed the Commission's order and in the dissent concerned he matter of price.

The holding of the court below, if permitted to stand, ill have extremely unfortunate consequences. It ould place difficult—if not insurmountable—obstacles the path of pipeline companies obtaining additional as supplies for the interstate market. Producers of atural gas obviously will be reluctant to apply for ertificates of public convenience and necessity if they ust—as the opinion of the court below would appear indicate—impliedly agree in advance to accept any ertificate issued by the Commission, regardless of ny conditions which might be imposed therein.

III.

HE COURT BELOW COMMITTED REVERSIBLE ERROR BY DECIDING SUA SPONTE A QUESTION NOT RAISED BY RESPONDENTS

The reversal of the Commission's order was based the stated ground (discussed in Section II above) at the Commission lacked jurisdiction to issue certificates in this case because the applicants had, by efusing to accept a lower initial price, circumscribed he scope of the Commission's inquiry, thus "requiring he Commission to forego the consideration of an elent which may be necessary in the formulation of its dgment" (R. 662).

Section 19(a) of the Natural Gas Act provides that as a condition precedent to invoking the review authority of the courts, a petitioner must first file with the Commission an application for rehearing setting forth the specific ground or grounds upon which such application is based. Section 19(b) of the Act provides that:

> "* * * No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. * * *"

The Respondents here, in their applications for rehearing before the Commission, urged various objections to the Commission's order. None, however, mentioned or alluded to any ground which could be construed as contending that the Commission lacked jurisdiction to entertain the applications or to issue the certificates involved (R. 447a-474a). Nor did any of the Respondents raise such an objection before the court below. Accordingly, the court below was precluded from deciding this case on a ground not urged before the Commission on rehearing. *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 324 U.S. 635, 649-651, 65 S. Ct. 821, 828-9 (1945). The court below was also precluded from raising the matter *sua sponte*. *F.P.C.* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498-501, 75 S. Ct. 467, 471-3 (1955); *Cf. Halsted* v. *S.E.C.*, 182 F. 2d 660, 669-70 (D.C. Cir., 1950).

In summary, if this Court is of a different view than Petitioner as to the *sua sponte* nature of the decision of the court below, then we respectfully urge this Court to find that the Commission is not required

in independent producer certificate proceedings under Section 7(e) of the Natural Gas Act, to make findings as to the justness and reasonableness of the initial price; and that the refusal by an applicant to accept a certificate conditioned on a lower initial price does not defeat the jurisdiction of the Commission to consider further the application.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

WILLIAM C. BRADEN, JR.
Tennessee Building
Houston 1, Texas

HARRY S. LITTMAN
JACK WERNER
HAROLD L. TALISMAN
317 Wyatt Building
Washington 5, D. C.

Counsel for Petitioner

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